COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS **SUPERIOR COURT NO. 2282CV00400**

TOWN OF BROOKLINE, MASSACHUSETTS, and ELISABETH CUNNINGHAM, GEORGE WARNER, DANIELA RAMIREZ, ANNE LE BRUN, JESSE GRAY, KATHRYN GRAY, CHARLOTTE GAEHDE, STEPHAN GAEHDE, STEPHANIE GAEHDE, LILLY GAEHDE, SUSHMA BOPPANA, KATHLEEN MCSWEENEY SCANLON, MARY DEWART, BARBARA STEIN, JIN SUK, MICHAEL MOSBROOKER, LISA VIOLA, DONNA VIOLA, JAMES VIOLA, and MARSHA JONES,	)
Plaintiffs,	)
v.	)
MAURA HEALEY, Attorney General for the Commonwealth of Massachusetts,	)
Defendant.	)

MEMORANDUM IN SUPPORT OF THE MASSACHUSETTS ENERGY MARKETERS ASSOCIATION'S OPPOSITION TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS AND IN SUPPORT OF THE MASSACHUSETTS ENERGY MARKETERS ASSOCIATION'S DEEMED CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

In accordance with Mass. R. Civ. P. 12(c) and Superior Court Standing Order 1-96, this Memorandum is filed in support of the Opposition of the Massachusetts Energy Marketers Association ("MEMA") to the Plaintiffs' Motion for Judgment on the Pleadings, and in support of MEMA's Deemed Cross-Motion for Judgment on the Pleadings.

I. INTRODUCTION

The Town of Brookline (the "Town") and 20 individuals identifying themselves as residents of the Town (collectively, the Town and 20 individuals are "Plaintiffs") filed a complaint seeking certiorari review pursuant to G.L. c. 249, § 4, of the decision issued February 25, 2022, by the Attorney General ("AG") pursuant to G.L. c. 40, § 32 and G.L. c. 40A § 5 (the "AG Decision"), in which the AG disapproved Articles 25 and 26 adopted at the Town's 2021 Annual Town Meeting that closed on June 7, 2021 (together the "Articles"). The Articles would amend the Town's Zoning Bylaw to establish restrictions and prohibitions on the use of fossil fuels in new building construction and major building renovations, by imposing a requirement to undertake new construction or renovation projects without any fossil fuel infrastructure as a condition for project proponents to obtain certain forms of zoning relief by special permit.

In the AG Decision, the AG determined that the Articles were in conflict with the plain language of G.L. c. 40A and were inconsistent with state law, including *inter alia* the Massachusetts State Building Code, 780 CMR § 101 *et seq*., adopted pursuant to G.L. c. 143, §§ 93-98. In their Complaint, the Plaintiffs are seeking to have the AG Decision annulled and to have the matter remanded to the AG with instructions to approve the Articles.

MEMA was established in 1955 and is the Massachusetts trade association for the industry providing residential and commercial heating oil and liquid renewable biofuel. MEMA currently represents nearly 300 companies, including companies providing retail heating oil, biofuel, diesel fuel and propane; wholesale petroleum operations; biofuel producers and distributors; heating equipment manufacturers and distributors; and a host of companies providing goods and services to the industry. MEMA also serves as the qualified state association for the National Oilheat Research Alliance ("NORA"), a congressionally authorized program aimed at promoting heating

oil and biofuel blends; developing energy efficiency initiatives; educating consumers and the industry; and developing research and development projects leading to cleaner heating fuels and more efficient heating equipment. Collectively, MEMA's retail members store, sell and deliver nearly 70 percent of the residential and commercial heating oil used in Massachusetts, including Brookline. These companies and related businesses employ several thousand highly skilled workers. Retail heating oil companies provide a reliable, safe and economical liquid fuel energy source to more than 750,000 homes and businesses in the Commonwealth, including Brookline.

In the *Memorandum in Support of Their Motion for Judgment on the Pleadings* ("Pls. Memo"), the Plaintiffs assert that "the climate crisis is real and immediate," and "the time to act is now; tomorrow will be too late." Pls. Memo at 1. The Plaintiffs claim that, despite undertaking extensive efforts to address climate change, the Commonwealth of Massachusetts "remains far behind where it must be to avert climate catastrophe," that "municipalities like Brookline want to help," and that "Brookline should not be denied its authority to help ensure a safer climate future for its residents and others." Id. at 3.

In fact, Massachusetts has taken significant steps to reduce greenhouse gas ("GHG") emissions, including recent legislation to allow cities and towns to regulate the use of fossil fuels in buildings, thus making individual efforts like Brookline's unnecessary. *An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy* enacted as Chapter 8 of the Acts of 2021 (the "Climate Act") sets new, aggressive statutory sub-limits to reduce GHG emissions. Section 31 of the law directs the Massachusetts Department of Energy Resources ("DOER"), along with the Board of Building Regulations and Standards ("BBRS"), to develop a municipal opt-in specialized energy stretch code by 2023 that defines "net-zero emissions building" and sets related building performance standards. Additionally, *An Act Driving Clean Energy and Offshore Wind*

enacted as Chapter 179 of the Acts of 2022 ("Clean Energy Act") authorizes DOER to create a pilot demonstration program, notwithstanding the restrictions in G.L. Chapter 40A, for ten municipalities to implement by-laws or ordinances that require new buildings or major renovations to be fossil-fuel free and to "enforce restrictions and prohibitions on new building construction and major renovation projects that are not fossil fuel-free." Clean Energy Act, § 84(c).[1] To further reduce GHG emissions, Governor Baker issued Executive Order 594 in April 2021 requiring state buildings using heating oil to purchase oil blended with advanced, renewable liquid biofuels.

These broad initiatives dispel the Plaintiffs' inaccurate notion that not enough is being done in Massachusetts to ensure a "safer climate future." The Plaintiffs' motivation to "help" in the effort to reduce global greenhouse gas emissions is not a sufficient basis to overcome the fact, as correctly determined by the AG in accordance with G.L. c. 40, § 32, that the Articles cannot take effect because they are in direct and sharp conflict with state law.

The Plaintiffs assert that the "Articles represent little more than Brookline's exercise of traditional municipal zoning power over land use, bolstered by Massachusetts' Home Rule Amendment," that the Articles "use traditional municipal regulation," and that the Articles "are neither extraordinary nor beyond Brookline's traditional authorities, both as part of local zoning and Constitutional Home Rule powers." Id. at 2-3. As discussed below, the AG Decision holds that the Articles exceed the scope of what may be done through the exercise of traditional municipal zoning power and the Massachusetts Home Rule Amendment.

II. SUMMARY OF THE ARTICLES AND THE AG'S DECISION

Article 25 would apply within Brookline's Emerald Island Special District ("EISD"). In the EISD, a proponent can seek to obtain a special permit to obtain relief from some dimensional

[1] This pilot program expressly does not interfere with DOER's creation of the municipal opt-in specialized stretch energy code under Section 31 of the Climate Act.

standards or to authorize a use that is not already authorized. Article 25 would add a new requirement to the standards for obtaining a special permit in the EISD, i.e., that the new building shall be "free of on-site fossil fuel infrastructure." In other words, a project proponent could not obtain a special permit for alternative uses or dimensional relief without acceding to a separate, unrelated restriction to forego entirely the use of fossil fuel for space heating and water heating.

Article 26 would apply to special permits for property in Brookline outside the EISD. It would impose two restrictive conditions for any special permit being granted for a proposed development if the proponent does not accede to a separate restriction to forego the use of on-site fossil fuel infrastructure: (1) the special permit would impose a condition requiring the permit to be renewed after an initial term of five years (or after 2030, whichever comes later); or (2) the special permit would impose a condition limiting the permit to the initial permit applicant and this "personal" permit could be transferred only in limited circumstances. The Plaintiffs suggest that "Like Article 25, Article 26 ***incentivizes*** climate-conscious action through discretionary authority but ***does not compel*** it." Pls. Memo at 5 (emphasis added). As discussed *infra*, the AG did not agree that the Articles contain mere incentives. Record at page 204 ("R-204").

The AG's Decision relied upon four grounds: (1) the Articles regulate "the use of materials, or methods of construction of structures regulated by the state building code" in violation of G.L. c. 40A, § 3; (2) the Articles are preempted by the State Building Code, including the incorporated Gas Code and Fire Code; (3) the Articles are preempted by G.L. c. 164, under which the Massachusetts Department of Public Utilities ("DPU") regulates the sale and distribution of natural gas in the Commonwealth; and (4) Article 26 conflicts with the special permit and uniformity provisions in the Zoning Act, G.L. c. 40A, § 9. R-198-199.

STANDARD OF REVIEW

The standard of review to be applied under G. L. c. 249, § 4, depends on "the nature of the action sought to be reviewed." *Black Rose, Inc. v. City of Boston*, 433 Mass. 501, 503 (2001), quoting *Boston Edison Co. v. Boston Redevelopment Auth.*, 374 Mass. 37, 49 (1977). Here, the AG was acting in accordance with her authority under G.L. c. 40, § 32. This statute does not provide any "fixed criteria" for the AG's determination whether a bylaw is valid. It states that "before a by-law takes effect it shall be approved by the attorney general," and "[i]f the attorney general disapproves a by-law [s]he shall give notice to the town clerk of the town in which the by-law was adopted of [her] disapproval."

As such, the AG's Decision here was "an exercise of discretion," and "under these circumstances, the Court reviews the Attorney General's decision under an arbitrary and capricious standard of review." See *Board of Selectmen of the Town of Hull & the Town Manager of the Town of Hull v. Maura Healey, Attorney General*, 34 Mass.L.Rptr. 521, *4 (2017), citing *Frawley v. Police Comm'r of Cambridge*, 473 Mass. 716, 728 (2016); *Forsyth School for Dental Hygienists v. Board of Registration in Dentistry*, 404 Mass. 211, 217 (1989); *T.D.J. Development Corp. v. Conservation Comm'n of North Andover*, 36 Mass. App. Ct. 124, 128 (1994). "In applying the arbitrary and capricious standard, the Court does not weigh evidence, find facts, exercise discretion, or substitute its judgment for that of the administrative body, but rather determines if the decision is legally erroneous or without factual support." Id., citing *FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone,* 41 Mass. App. Ct. 681, 684–685 (1996).

III. DISCUSSION

The AG acknowledged the environmental policy goal that led the Town to adopt the Articles. R-198. However, the AG made clear that in implementing the obligation of review under

G.L. c. 40, § 32, "the Attorney General is precluded from taking policy issues into account." Id., citing Amherst v. Attorney General, 398 Mass. 793, 798-99 (1986) (the AG may not comment on the wisdom of a by-law). The AG emphasized that under G.L. c. 40, § 32, her review is only to determine if the by-law conflicts with the laws or Constitution of the Commonwealth, and "if it does conflict, the [AG] must disapprove the by-law, regardless of the policy views that she may hold on the matter." Id., citing Amherst v. Attorney General,

A. Conflict with the Zoning Act (G.L. c. 40A, § 3)

The AG determined the Articles conflict with the provision in G.L. c. 40A, § 3, which states "No zoning ordinance or by-law shall regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code." R-201. As the AG noted, this provision applies to all structures regulated under the State Building Code, 780 CMR 100.00, adopted by the BBRS pursuant to G.L. c. 143, § 93. The AG indicated that during review of the Articles, the BBRS communicated its view that the Articles violate G.L. c. 40A, § 3 because they regulate the materials or methods of construction of structures that are regulated by the Building Code. R-202-203.

In challenging this basis for the AG's decision, the Plaintiffs argue that the AG "supplied no useful definition of 'materials, or methods' against which to judge her decision and that phrase is, in fact, an enigma." Pls. Memo at 10. The Plaintiffs go on to suggest that "Brookline has not voted to tell anyone how to install fossil fuel infrastructure or prohibited them from doing so. Instead, Brookline confined the Articles solely to incentivizing voluntary choices, for special permits, about how certain land uses are to be effectuated. " Pls. Memo at 11. The issue is not whether the Articles direct "how" building materials are to be installed. They control whether the materials can be installed by imposing considerable restrictions on the underlying special permit

in a manner that makes the decision not to use those materials involuntary.

In this context, the Plaintiffs have misinterpreted Enos v. City of Brockton, 354 Mass. 278 (1968) ("Enos"), the key decision relied upon by the AG. The AG noted that "in Enos, the court ruled that a Brockton zoning ordinance requiring 'a certain type of wall and floor to be utilized in the construction of a dwelling' was not authorized by the Zoning Act." R-202. As the AG noted, "[t]hese matters [the type of walls and flooring] are properly the subject of building codes rather than zoning regulation." Id., quoting Enos, 354 Mass. at 280. The Plaintiffs ignored this aspect of Enos and are mistaken in relying on Enos to support their position.

The same is true of the unpublished Appeals Court decision in Wildstar Farm, LLC v. Planning Bd of Westwood, 81 Mass. App. Ct. 1114 (Feb. 15, 2012) ("Wildstar Farm"). In that case, the Appeals Court ruled that a site plan review decision (i.e., *not* a zoning bylaw) that included a requirement to install a sprinkler system in a proposed building was not preempted by G.L. c. 40A, § 3. The Appeals Court determined that "sprinkler systems" were not "methods of construction of structures," but the Appeals Court did not address whether the site plan review decision ran afoul of the aspect of the prohibition in G.L. c. 40A, § 3 against regulating the "use of materials." Consequently, the unpublished decision in Wildstar does not support the Plaintiffs' misapplication of the decision and their contention that "if equipment as integral to building safety as fire suppression systems are not '***materials, or*** methods of construction' as used in G.L. c.40A, §3, it cannot be that the limiting language in the Zoning Act reaches fossil fuel piping." Pls. Memo at 12 (emphasis added). The installation of equipment and infrastructure in a building necessary to support the use of heating oil for producing and distributing space heating and water heating is undoubtedly the use of "materials" in the "construction" of a building. Wildstar is not a valid precedent here. Instead, the AG properly relied upon the operative precedent in St. George Greek

Orthodox Cathedral of Western Mass. Inc v. Fire Dept. of Springfield, 462 Mass. 120 (2012) and several Land Court decisions on this specific topic. R-202.

With no apparent attempt at irony, the Plaintiffs argue:

> The Articles do not regulate the size, shape, strength, or composition of oil or gas piping, where it is to be located, or how it is to be installed, tested, or inspected for safety. Accordingly, what caselaw is to be found on the subject supports the conclusion that the Articles do not violate G.L. c.40A, § 3.

Pls. Memo at 12. The issue is not whether the Articles attempt to regulate how heating oil infrastructure is designed, maintained, or tested; the issue is whether they prohibit the use at all of such materials in construction. The AG properly concluded, with deliberate and careful reasoning, that the Articles are "requirements," and not passive incentives for voluntary decisions. R-204.

B. Conflict with the State Building Code

The AG also determined that the Articles conflict with the State Building Code, including 527 CMR 105, § 11.5 (regulating installation of fuel oil burners and all equipment in connection therewith); 527 CMR 105, § 11.5.1.10.8 (regulating fill and vent piping); and 527 CMR 105, § 11.5.10.10.1 (regulating oil supply and return lines). R-203. The AG ruled that "the broad preemptive effect of the Building Code" preempts all municipal by-laws like the Articles when they "would restrict, expand, or in any way vary what is otherwise permitted or prohibited by the Code." R-204. Where the Building Code "regulates a topic, a local by-law cannot second guess the Board's determination by adopting a local regulation of that topic." Id., citing Town of Wendell v. Attorney General, 394 Mass. 518, 529 (1985).

C. The Home Rule Amendment Does Not Provide Validity for the Articles.

The Plaintiffs contend that the Articles are validated by the Home Rule Amendment that "gives municipalities explicit power to 'adopt[ ], amend[ ], or repeal' local ordinances or by-laws, and authorizes the 'exercise [of] any power or function which the general court has the power to

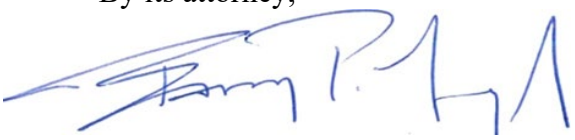
confer upon it.'" Pls. Memo at 7, citing Article II, § 6 of the Amendments to the Constitution of Massachusetts. The AG does not dispute that general premise, but she identified the operative element of the Home Rule Amendment that the Plaintiffs acknowledged, but did not address, ignored, i.e., that "a municipality has no power to adopt a zoning by-law that is 'inconsistent with the constitution or laws enacted by the [Legislature]." R-201. Simply put, the AG correctly applied the important limits in the Home Rule Amendment within her decision here.

IV. CONCLUSION

The AG's decision invalidating the Articles was not arbitrary and capricious. The decision is not legally erroneous and does not lack factual support. Based on the foregoing, the Court should deny the Plaintiffs' Motion for Judgment on the Pleadings, and grant MEMA's Cross-Motion for Judgment on the Pleadings.

Respectfully submitted,

MASSACHUSETTS ENERGY MARKETERS ASSOCIATION,
By its attorney,



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